In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 229

FEDERICO MARIN GUTIERREZ,
PETITIONER,

v.

WATERMAN STEAMSHIP CORP.,
RESPONDENT.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported below at 301 F.2d 415. The opinion of the United States District Court for the District of Puerto Rico was reported at 193 F. Supp. 894.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered April 11, 1962. Petition for a Writ of Certiorari was filed on July 5, 1962 and was granted, October 8, 1962.

The jurisdiction of this Honorable Court to review the final judgment of the United States Court of Appeals for the First Circuit is provided by Sections 1254 (1) and 2101 (c) of Title 28, U. S. Code.

Constitutional and Statutory Provisions

The constitutional provision involved is:

United States Constitution, Article 3, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;— to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

The statutes involved are:

Public Law 695 of June 19, 1948, c. 526, 62 Stat. 496; 46 U. S. Code, Section 740.

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

"In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further*, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage."

Laws of Puerto Rico Annotated, Title 11, Section 32:

"In cases where the injury, the occupational disease, or the death, entitling the workman or employee, or his beneficiaries, to compensation in accordance with this chapter, has been caused under circumstances making third parties liable for such injury, disease or death, the injured workman or employee or his beneficiaries may claim and recover damages from the third party liable for said injury, disease, or death, within one year following the date when becomes final the decision of the case by the Manager of the State

Insurance Fund who may subrogate himself in the rights of the workman or employee or his beneficiaries to institute the same action in the following manner:

"When an injured workman or employee, or his beneficiaries in case of death, may be entitled to institute an action for damages against a third person in cases where the State Insurance Fund, in accordance with the terms of this chapter, is obliged to compensate in any manner or to furnish treatment, the Manager of the State Insurance Fund shall subrogate himself in the rights of the workman or employee or of his beneficiaries, and may institute proceedings against such third person in the name of the injured workman or employee, or of his beneficiaries, within the ninety (90) days following the date on which the decision of the case becomes final and executory, and any sum which as a result of the action, or by virtue of a judicial or extra-judicial compromise, may be obtained in excess of the expenses incurred in the case, shall be delivered to the injured workman or employee or to his beneficiaries entitled thereto. The workman or employee or his beneficiaries shall be parties in every proceeding instituted by the Manager under the provisions of this section, and it shall be the duty of the Manager to serve written notice on them of such proceedings within (5) days after the action is instituted.

"If the Manager should fail to institute action against the third party liable, as set forth in the preceding paragraph, the workman or employee, or his beneficiaries, shall be fully at liberty to institute such action in their behalf, without being obliged to reimburse the State Insurance Fund for the expenses incurred in the case.

"Neither the injured workman or employee, nor his beneficiaries, may institute any action or compromise

any cause of action they may have against the third party liable for the damages, until after the lapse of ninety days from the date on which the decision of the case by the Manager of the State Insurance Fund became final and executory.

"No compromise between the injured workman or employee, or his beneficiaries in case of death, and the third party liable, made within the ninety (90) days following the date on which the decision of the case becomes final and executory, or after the lapse of said term if the Manager has filed his complaint, shall be valid or effective in law unless the expenses incurred by the State Insurance Fund in the case are first paid; and no judgment shall be entered in suits of this nature, nor shall any compromise whatsoever as to the rights of the parties to said suits shall be approved, without making express reserve of the right of the State Insurance Fund to reimbursement of all expenses incurred; Provided, That the secretary of the court part taking cognizance of any claim of the nature described above shall notify the Manager of the State Insurance Fund any order entered by the court which affects the rights of the parties to the case, as well as the final disposition of said case.

"The Manager of the State Insurance Fund may, with the approval of the Secretary of Labor of Puerto Rico, compromise as to his rights against a third party liable for the damages; It being understood, however, That no extrajudicial compromise shall impair the rights of the workman or employee, or of his beneficiaries, without their express consent and approval.

"Any sum obtained by the Manager of the State Insurance Fund through the means provided in this section shall be covered into the State Insurance Fund

for the benefit of the particular group into which was classified the occupation or the industry in which the injured or dead workman or employee was employed. Amended June 15, 1955, No. 70, p. 258, § 2, eff. June 15, 1955."

Statement of the Case

On October 21, 1956, Federico Marin Gutierrez, a longshoreman employed by an independent stevedoring contractor, was injured when he fell on the apron of the pier in Ponce, Puerto Rico, during the course of the unloading of the SS HASTINGS, a vessel owned and operated by the respondent.

The petitioner's duties were performed entirely on shore and he never went aboard the vessel. Prior to his injury, the vessel had discharged torn bags of beans, whose contents were spilled on the apron of the pier. Petitioner, engaged in the discharging operation, slipped on some of the spillage, fell and injured his back. The spillage had been observed while the bags were in midair on drafts attached to the ship's discharging equipment. (R. 23, 76, 77, 78, 152, Exhibit 10, 156 through 164).

Suit was filed in the United States District Court for the Southern District of New York on January 9, 1959. Under the analogous statute of limitations, 11 L.P.R.A. 32, the time to file would have expired on November 30, 1957. The libel specifically pleaded that laches did not apply because of excusable delay and absence of prejudice to the respondent. (R. 6 through 7).

The trial commenced on March 21, 1960. During the pendency of the action, prior to trial, the respondent caused the deposition of the petitioner to be taken and served interrogatories upon the petitioner, which were answered. In the deposition and in the answers to the inter-

rogatories, the petitioner gave the names and addresses of the eye-witnesses but the respondent made no effort to contact the witnesses prior to trial. (R. 151 and 153). The records of the respondent also indicated the eye-witnesses. (R. 132, 135).

At the conclusion of the trial, the Court stated:

> "Of course, I should advance to counsel, I believe that on the question of unseaworthiness and or negligence, the libelant has made a case, that as regards the question of laches the libelant has shown sufficient excuse for the delay, and that the only two questions with which the Court is really concerned are the question of the actual physical damage suffered by libelant as a consequence of the October 21, 1956 accident. Whether his present physical state is totally the result of that accident, or whether the accident aggravated in some way his physical state resulting from the 1951 accident, or whether the 1959 accident aggravated and to what extent the previous physical condition of the libelant.
>
> "I believe that in order to decide that, it is indispensable that the parties get a transcript of the medical testimony in the case, particularly I want to read pretty carefully the testimony of the two main experts, Dr. Rifkinson and Dr. Ramirez de Arellano. Of course, I have no doubt that part of the present condition of the libelant is due to the 1956 accident, but to what extent, and that's the important thing, in order to determine the damages.
>
> "I believe as to the material aspect of the damages I want the parties to discuss that more or less what appears from the evidence as to actual earnings of this libelant, if there is any evidence as to it, because the evidence is very weak in that. That's all I need.

> "I believe it isn't necessary to file briefs or discuss the exceptive allegations, and I had the opinion that it would have been factual and unnecessary to discuss those exceptive allegations. They are based precisely on what transpired at the trial. They stand or fall on the evidence offered here, so it is not necessary to make a separate discussion of that. Indeed, I believe that what I have said now disposes of the exceptive allegations." (R. 153-154).

Thereafter, the District Judge filed his opinion, findings of fact and conclusions of law. A specific finding was made that beans had been observed spilling from the drafts that were discharged from the vessel throughout the unloading operation. (R. 18). Another finding was made that the beans scattered about the surface of the pier created a dangerous condition for the longshoremen. (R. 18). It was also found that the cargo being discharged was defective and unseaworthy and that the shipowner was negligent in permitting the broken bags to be discharged and in failing to furnish libellant with a safe place to work. (R. 18-19).

Inasmuch as the documentary evidence produced by the respondent revealed the only potential eye-witnesses and also indicated cargo damage and spillage prior to and at the time of discharge, as well as the fact that medical evidence, including that of the treating physicians, was available, the District Court also found that the respondent had suffered no prejudice by the lapse of time between the injury and the filing of the suit. (R. 19).

The United States Court of Appeals for the First Circuit reversed all of these conclusions and findings. If the issues of unseaworthiness, negligence and laches are examined in inverse order, from that in which discussed in the opinion below, one finds that the Court of Appeals agreed that the suit would not be barred in the absence of prejudice, but

it concluded that the trial court erred in its evaluation of the factual evidence on which the finding of absence of prejudice was based. Not only did the appellate court make contrary findings of fact as to the issue of negligence, it also injected into the doctrine of negligence a new element;—that the tortfeasor must control or have a right to control the situs where the injury is consummated. Finally, on the issue of unseaworthiness the Court of Appeals for the First Circuit, while admitting that the condition of cargo may render a vessel unseaworthy and that the injured longshoreman was within the class of persons protected by the doctrine, refused to allow the decree to stand. Reasoning that the obligations of the doctrine of unseaworthiness were "awesome" and that the longshoreman was not about to go on a voyage, the Court concluded that it would not impose absolute liability upon the shipowner for injury to a shoreworker in circumstances which it conceded would ordinarily result in a recovery.

In short, to use their own expression, the Court refused to cross the gangway. The Congressional enactment extending admiralty jurisdiction to injuries consummated on land was fully briefed on appeal to the Court of Appeals and was totally ignored by the Court.

Questions Presented

1. Does a person, otherwise protected by the humanitarian doctrine of unseaworthiness, lose his rights under said doctrine, if he is injured ashore as a result of the unsafe condition of the cargo?

2. Does a shipowner who incurs in negligence that foreseeably will result in harm to a person, cease to be liable if the ultimate injury is consummated at a location that he does not control?

3. May the mere passage of time bar an otherwise meri-

torious claim if the trial court finds the respondent is not prejudiced by the delay?

4. Does an appellate court sitting in admiralty have the discretion to make findings of fact from the record, contrary to those of the trial court, if the original findings are amply supported by credible evidence?

Argument

POINT I. LONGSHOREMEN INJURED ASHORE, WHILE ENGAGED IN THE SERVICE OF THE SHIP, ARE ENTITLED TO THE SAME PROTECTION UNDER HUMANITARIAN DOCTRINE OF SEAWORTHINESS AS ARE LONGSHOREMEN INJURED ABOARD.

A shipowner warrants that his vessel is seaworthy.[1] This warranty runs to seamen[2] and to those performing the work traditionally done by seamen,[3] but does not apply to those not doing such work even if for the benefit of the ship.[4] That the doctrine extends to longshoremen is no longer an open question.[5] Nor has it ever been suggested that discharge of cargo, which is today generally done by longshoremen, was not the historical function of seamen.[6] The question posed by the decision below is whether that

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[1] *The Osceola*, 1903, 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760.

[2] *Mahnich* v. *Southern Steamship Co.*, 1944, 321 U.S. 96, 64 S. Ct. 445, 88 L. Ed. 561.

[3] *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099; *Pope & Talbot* v. *Hawn*, 1953, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143.

[4] *United New York and New Jersey Sandy Hook Pilots Ass'n.* v. *Halecki*, 1961, 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541; *Noel* v. *Isbrandtsen Company*, 4 Cir. 1961, 287 F.2d 783.

[5] *Seas Shipping Co.* v. *Sieracki*, *supra*; *The State of Maryland*, C.C.A. 4th, 1936, 85 F.2d 944.

[6] Jacobsen. *Laws of the Sea* (1819); *Dixon* v. *The Cyrus*, (D. Pa. 1789) 7 Fed. Cas. 755, Case No. 3,930; *Cloutman* v. *Tunison* (Cir. 1881) 6 Fed. 830; *The Circassion*, 1 Ben. 209, Fed. Cas. No. 2,722, (1867); *Gilbert Knapp*, 37 Fed. 209 (1889).

doctrine applies to a longshoreman injured on land. Other Circuits have resolved this question, reaching a result contrary to that of the First Circuit in the case at bar.[7]

In the landmark decision of *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, this Court anticipated the issue here presented and left it unanswered.[8] In 1946 the question presented a more difficult problem than it does today. At that time, land as a situs was beyond the reach of admiralty and maritime jurisdiction and a pier was held to be an extension of the land.[9] The doctrine of seaworthiness was a maritime concept and could not apply to a tort occurring on land where local law was supreme, albeit different as one moved from state to state.

Two years later Congress provided a solution startingly simple—it extended the admiralty and maritime jurisdiction to include "all cases of damage or injury, to persons or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."[10] Henchforth, a vessel would have

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[7] *Strika* v. *Netherlands Ministry of Traffic*, 2 Cir. 1950, 185 F.2d 555; cert. denied. (1951), 341 U.S. 904, 71 S. Ct. 614, 95 L. Ed. 1343; *Pope & Talbot, Inc.* v. *Cordray*, 9 Cir., 1958, 258 F.2d 214; *American Export Lines, Inc.* v. *Revel*, 4 Cir., 1959, 266 F.2d 82; *Hagans* v. *Farrell Lines, Inc.*, 3 Cir. 1956, 237 F.2d 477.

[8] "In this case we are not concerned with the question whether the same policy extends to injuries incurred ashore by a stevedore engaged in the same work, a matter which is relevant however in *Swanson* v. *Marra Brothers, Inc.*, 328 U.S. 1, 66 S. Ct. 869; *Cf. O'Donnell* v. v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 63 S. Ct. 488, 87 L. Ed. 596". 328 U.S. 85 at p. 100; 66 S. Ct. 872, at p. 880.

[9] *Cleveland T. & V.R. Co.* v. *Cleveland Steamship Co.* (1908), 208 U.S. 316, 28 S. Ct. 414, 52 L. Ed. 508; *State Industrial Commission* v. *Nordenholt Corporation*, 1922, 259 U.S. 263, 42 S. Ct. 473, 66 L. Ed. 933; *T. Smith & Son* v. *Taylor*, 1928, 276 U.S. 179, 48 S. Ct. 228, 72 L. Ed. 520; *The Plymouth*, 1886, 70 U.S. (3 Wall.) 20, 18 L. Ed. 125.

[10] Public Law 695 of June 19, 1948, c. 526, 62 Stat. 496; 46 U.S. Code, Section 740.

the same obligations regardless of where the injury was consummated, including *in rem* liability, and the uniformity of the admiralty law, so anxiously sought,[11] was now achieved. The first case[12] decided after passage of the act referred at once to the question left unanswered in *Sieracki*, supra. In *Sieracki*, this Court cited *Swanson* v. *Marra Brothers, Inc.*, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045, which was decided the very same day as *Sieracki*. Swanson involved the harmonization of *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, supra, and *International Stevedore Co.* v. *Haverty*,[13] a decision dating from 1926.

In 1926, longshoremen were considered to be seamen for some purposes, among which was the right to bring suit against their employers under the Jones Act.[14] In 1927, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act,[15] which eliminated longshoremen from coverage under the Jones Act because they were not members of the crew of a vessel, and which also made compensation the exclusive remedy against the employer.

The *O'Donnell* case held that a seaman injured on land could recover under the Jones Act for the injuries resulting from the negligence of a fellow seaman. Haverty, a longshoreman, had recovered under the Jones Act from his employer for injuries suffered aboard the vessel. In the *Swanson* case the plaintiff longshoreman juxtaposed the *Haverty* and *O'Donnell* cases and claimed the right to

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[11] *Southern Pacific Co.* v. *Jensen*, 1917, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086.

[12] *Strika* v. *Netherlands Ministry of Traffic*, 2 Cir. 1950, 185 F.2d 555.

[13] *International Stevedore Co.* v. *Haverty*, 1926, 272 U.S. 50, 47 S. Ct. 19, 71 L. Ed. 157.

[14] Act of June 5, 1920, c. 250, § 33, 41 Stat. 1007, 46 U.S.C.A. § 688.

[15] Federal Longshoremen's and Harbor Workers' Compensation Act, Mar. 4, 1927, c. 509, § 1, 44 Stat. 1424, 33 U.S.C.A. § 901 et seq.

recover under the Jones Act for negligently inflicted injuries sustained ashore. Although the plaintiff in the *Swanson* case tried to ignore the statute which legislatively overruled *Haverty*, this Court did not do so and denied recovery.

There remained the original question as posed by *Sieracki* prior to the passage of the Extension of Admiralty and Maritime Jurisdiction Act. Stated otherwise—would Swanson have recovered for injuries ashore had he sued the vessel or its owner instead of his employer?

Judge Learned Hand reasoned that Swanson would have recovered in admiralty independent of the jurisdiction conferred by Congress.[16] In his opinion, Swanson was denied recovery only because the Longshoremen's and Harbor Workers' Compensation Act barred him from suing his employer. Had that statute not been passed, Swanson would have recovered as did the seamen O'Donnell, who was also injured ashore. Inasmuch as Swanson was distinguished in the Sieracki opinion not on the basis of the situs of the accident, but only because compensation had become the exclusive remedy against the employer, Judge Hand concluded that if Swanson had sued the vessel, he would have been entitled to recover under the doctrine of unseaworthiness, and he therefore affirmed an award as to the longshoreman, Strika.

Judge Swan dissented because he felt that any extension of the doctrine of unseaworthiness to shore-based longshoremen should be decided only by this tribunal. Whether this Court agreed with Judge Hand's reasoning, or whether the passage of the Extension of Admiralty and Maritime Jurisdiction Act was the basis of decision, is not significant. In any event certiorari was denied,[17] and there-

[16] *Strika* v. *Netherlands Ministry of Traffic*, 2 Cir. 1950, 185 F.2d 555.

[17] 341 U.S. 904, 71 S. Ct. 614, 95 L. Ed. 1343.

after all shore-based longshoremen enjoyed a remedy against the vessel and its owner.

From *Strika* to the decision below, every federal court in the intervening twelve years has granted recovery to longshoremen injured ashore as a result of an unseaworthy condition:

Hagans v. *Farrell Lines, Inc.*, 3 Cir. 1956, 237 F.2d 477 [18]

Pope & Talbot, Inc. v. *Cordray*, 9 Cir. 1958, 258 F.2d 214 [19]

American Export Lines, Inc. v. *Revel*, 4 Cir. 1959, 266 F.2d 82

Valerio v. *American/President Lines*, D.C.S.D.N.Y. 1952, 112 F. Supp. 202.

Litwinowicz v. *Weyerhaeuser SS Co.*, D.C.E.D. Pa. 1959, 179 F. Supp. 812.

Di Salvo v. *Cunard S.S. Co.*, D.C.S.D.N.Y. 1959, 171 F. Supp. 813.

Hagans v. *Ellerman & Bucknall Steamship Co.*, D.C. E.D. Pa. 1961, 196 F. Supp. 593.

Fisher v. *United States Lines Company*, D.C.E.D. Pa. 1961, 198 F. Supp. 815.

Because the unseaworthiness obligations are "awesome", the Court below refused to "cross the gangway". The reasons given fall into two classes: one, that although a longshoreman, and performing the traditional work of a seaman, the petitioner was not about to go on a voyage, and a new label should be devised for him, denying him

[18] In this case, neither the lawyers nor the courts raised any question as to the longshoreman's right to recover.

[19] The longshoreman's duties in this case were primarily ashore but he was injured aboard. The Court of Appeals stated: "We ho'd that the duty of providing a seaworthy ship and gear at the time of this accident extended to appellee, whether or not appellee was on board the ship or on the dock". 258 F.2d 214, 218.

the concommitant rights of this "awesome" duty; and, two, that although the condition of the cargo was unseaworthy, this should not impose absolute liability, at least, not to this petitioner.

The doctrine of seaworthiness has long troubled the Court of Appeals for the First Circuit. In 1959, that Court felt that the law should be different from the pronouncements of the Supreme Court.[20] The decision below is but another attempt to turn back the clock and abrogate the doctrine.

What is seaworthiness?

> "It is a form of absolute duty owing to all within the range of its humanitarian policy.
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> "On principle we agree with the Court of Appeals that this policy is not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his consent or by his arrangement. All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection.".[21]

If the considerations that gave birth to the liability are still existent, and if the owner may not delegate his responsibility, by what right is a longshoreman who it is conceded was performing the seaman's historical duty eliminated from the scope of the policy? The ship was

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[20] *Mitchell* v. *Trawler Racer, Inc.*, 1 Cir. 1959, 265 F.2d 426, reversed, 1960, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941.

[21] *Seas Shipping Co.* v. *Sieracki*, 328 U.S. at page 95.

no less unseaworthy and the injured worker no less a longshoreman than were the vessels or claimants in any of the other cases. It is the status of the injured worker that governs the relationship.

Only two cases are cited by the Court of Appeals to support its position and neither is apposite. *Partenweederei Ms Belgran* v. *Weigel*, 9 Cir. 1962, 299 F.2d 897, certiorari denied October 8, 1962, is not in accord with the First Circuit in recognizing limits in this area to principles of absolute liability. There can be no doubt that the Court of Appeals for the Ninth Circuit would have decided the case at bar as did the District Court below. In denying extension of the doctrine to a tractor driver, that Court established the criteria for determining who falls within the scope of the doctrine:

> "The evidence of this case relating to the nature of libelant's work is not in dispute. The libelant was driving a tractor on the dock. His job was to push or pull railroad cars loaded with lumber up to a point on the spur track where the lumber could be reached by the ship's loading gear. He did not participate in loading the lumber onto the vessel or in stowing it. He had nothing to do with ship's tackle nor did his work require him to perform any service aboard the ship. His work was performed solely on the dock and in an operation preliminary to, but separate from, the work of loading the lumber onto the vessel. Although libelant's work brought him close enough to the vessel to be injured by the falling boom, liability arises not from the place of injury but from the nature of the work being performed. . . .
>
> "Was the nature of libelant's work of the type traditionally performed by seamen?" 299 F.2d at page 902.

The petitioner herein *did* participate in discharging the cargo from the vessel. His work *was* directly concerned with the ship's tackle. His work was *not* separate from the discharge. His work *was* of the type traditionally performed by seamen.

The only similarity between the two cases is that the worker did not recover—in the one case, because he was not within the scope of the doctrine, and in the instant case, because the Court has arbitrarily refused to apply the doctrine.

The other citation in the opinion below lends no support to the position taken by the Court of Appeals for the First Circuit. *Kent* v. *Shell Oil Company*, 5 Cir. 1961, 286 F.2d 746, neither limits the doctrine of unseaworthiness nor of maritime negligence. Kent, a truck driver, was injured when replacing wooden skids on the ground between his truck and a barge. He tried his case to a jury without offering proof of any unseaworthy condition. He requested a charge on that issue, which became the crucial question on appeal. The Court of Appeals for the Fifth Circuit held that the injuries were non-maritime in nature, that no evidence had been presented so as to instruct the jury on unseaworthiness, and specifically refrained (in footnote 14 at page 751) from taking a stand on the issues presented in *Strika*, *Cordray* and *Valerio*, *supra*.

This year the same Court has *sub silencio* taken a stand and has aligned itself with all other Circuits except the First. In *Koninklyke Nederlandshe, etc.* v. *Strachan Shipping Co.*, 5 Cir. 1962, 301 F.2d 741, rehearing denied, June 20, 1962, a shore-based longshoreman was allowed to recover, and the vessel owner was granted indemnity against the stevedoring contractor. To be sure, the longshoreman's claim was compromised prior to trial and the only issue was whether the steamship company's right to indemnity

was cut off by the workmen's compensation law of Texas. Said the Court at page 746:

> "We held in Kent, supra, that a state compensation act can bar an injured employee from suing a third party. If, however, such a suit is permitted, and is pursued to final settlement, a state compensation act cannot prevent an action against the employer by the third party based on federal judicially established maritime warranty."

Implicit in the above quotation is the proposition that a state can no more bar a claim under federal judicially established principles of unseaworthiness than it can bar the claim by the third party against the employer. There can be no valid claim for indemnity unless there is a valid claim against the indemnitee. Whereas Kent was a truck driver whose injury was non-maritime, Rawlinson, the injured party in the latter case, was a shore-based longshoreman, injured, presumably, as a result of unseaworthiness. The Court of Appeals for the First Circuit to build upon the Kent case has sunk its piles into quicksand. This becomes readily apparent if we return to the Kent case to see the context of its quotation including the phrase "awesome obligations."

> "Unseaworthiness to be sure sets in train awesome obligations which distinguish it from negligence. (Citations omitted). But neither under negligence principles nor the unseaworthiness doctrine does mere injury give rise to a claim. There must be evidence . . . Nor was there any evidence."
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> 286 F2d 746, at 752.

This is hardly basis for saying longshoremen injured ashore cannot recover and the District Courts in the Fifth Circuit, relying on these cases and the Extension of Admiralty and Maritime Jurisdiction Act consistently follow the view of *Strika*.

Leonard v. *Lykes Brothers Steamship Co.*, D.C.E.D. La. 1962 F. Supp. ; *Matherne* v. *Superior Oil Company*, D.C.E.D. La. 1962, 207 F. Supp. 591.

The unseaworthy condition itself, the broken cargo, was "being used" to impose liability, according to the Court below. For its view, which again is contrary to all other reported cases, the Court cited no authority. The contrary authority includes:

Ryan Stevedoring Co., Inc. v. *Pan Atlantic Steamship Corp.*, 1956, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133

Amador v. *A/S Ludwig Mowinckels Rederi*, 2 Cir. 1955, 224 F.2d 437, certiorari denied, 350 U.S. 901, 76 S. Ct. 179, 100 L. Ed. 791.

Gindville v. *American Hawaiian Steamship Company*, 3 Cir. 1955, 224 F.2d 746.

Curtiss v. *A. Garcia Y Cia.*, 3 Cir. 1957, 241 F.2d 30.

Reddick v. *McAllister Lighterage Line*, 2 Cir. 1958, 258 F.2d 297.

Rich v. *Ellerman & Bucknall SS Co.*, 2 Cir. 1960, 278 F.2d 704.

Some of the District Court cases previously cited involved the same combination of factors as did the instant case—unseaworthy cargo and shore-side injuries. All District Judges (including the District of Puerto Rico), relying on the same authorities, granted recovery.

Valerio v. *American President Lines*, D.C.S.D.N.Y. 1952, 112 F. Supp. 202.

Robillard v. *A. L. Burbank & Co., Ltd.*, D.C.S.D.N.Y. 1960, 186 F. Supp. 193.

Hagans v. *Ellerman & Bucknall Steamship Co.*, D.C. E.D. Pa. 1961, 196 F. Supp. 593.

Once an unseaworthy condition exists, it does not cease to be an unseaworthy condition because the injury is consummated on land. Nor is there any reason why a condition which is the proximate cause of damage should cease to impose liability because the injured worker is handling tackle ashore rather than aboard.

Upon analysis, what disturbs the Court of Appeals for the First Circuit is not situs, status nor foreseeability. The petitioner herein was closer to the vessel than either Hagans or Russo (in the *Valerio* case) or Revel or Robillard or Di Salvo or Litwinowicz. No one has ever suggested that the petitioner was outside the scope of the warranty of seaworthiness. Unlike the weird combinations of factors that have caused some courts to limit the ambit of responsibility[22] in tort law, there was no question that the condition was as likely to cause harm to workers ashore as aboard. Neither logic nor law supports the result. Apparently the desire to impose limits to the "awesome obligation" of unseaworthiness has prompted this decision. Just as in *Mitchell* v. *Trawler Racer, Inc.*, 1 Cir., 1959, 265 F2d 426, reversed, 1960, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 941. Wherein the Court below tried to limit the doctrine in time, it now has tried to limit the doctrine in space.

If as this Court has labeled it, the doctrine is a humanitarian one, it may not be so limited.

[22] e.g., *Palsgraf* v. *Long Island R. Co.*, 1928, 248 N.Y. 339, 169 N.E. 99, 59 A.L.R. 1253.

POINT II. A SHIPOWNER MAY BE LIABLE FOR NEGLIGENCE IF IT IS FORSEEABLE THAT THE ACTS OR OMISSIONS ABOARD ARE LIKELY TO HARM PERSONS ASHORE.

In its findings (R. 18-19) the trial court found that beans had been observed spilling from drafts,[23] that beans were scattered about the pier,[24] that the shipowner was negligent in permitting the broken and weakened cargo to be discharged when it knew or should have known that injury was likely to result,[25] that the respondent was negligent in allowing this condition to remain existent, and that the respondent had failed to furnish petitioner with a safe place to work.[26]

The Court of Appeals has ruled that these findings cannot stand. As to the substantiality of evidence to support these findings, more will be said below. We are now concerned with two other matters injected by the appellate tribunal. It is claimed that if there was spillage which caused an unsafe condition, respondent was not shown to have participated in that conduct nor did it control or have the right to control the locus of the accident.[27]

Control or the right to control the locus of injury is not an element of negligence. In basic terms, the Court of Appeals asserts that if A creates or permits a dangerous condition to be created on the property of B and C is injured as a consequence of said dangerous condition, A cannot be liable, no matter how foreseeable that harm would ensue or whether A knew or should have known of the condition. This proposition, we submit, does not reflect the law of negligence as it exists anywhere, least of all under admiralty principles.

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[23] Finding of Fact No. 6, Record, page 18.
[24] Finding of Fact No. 7, Record, page 18.
[25] Finding of Fact No. 9, Record, page 18.
[26] Finding of Fact No. 10, Record, pages 18-19.
[27] Record, page 167.

The risk defines the duty to be obeyed, and whether or not the shipowner participated in the discharge is inconsequential. It permitted this dangerous method of discharge when it had a duty to provide a safe place to work.

By the pronouncement of this Court the shipowner's duty is defined as "exercising reasonable care under the circumstances of each case".[28] For negligently creating a condition ashore, the shipowner has been liable when the injured party was a seaman.[29] For failing to post a watchman, the shipowner has been held liable for resulting injury to a shore-based longshoreman.[30] Whether the shipowner actively participated in creating the dangerous condition or passively permitted the condition to be created by another, his duty to exercise reasonable care did not change. As the trial Court found, the shipowner knew that bags were broken and leaking. If it did not know this, it should have. Coopers were employed aboard and ashore sewing bags. The cargo had arrived in port in that condition and the shipowner permitted its discharge in that condition.

Relying on the same body of decisions as did the trial court below, another District Judge upheld a jury verdict in favor of an injured longshoreman who was 100 feet inside a shed rather than alongside the vessel, declaring:

> "The facts in this case made it abundantly clear that bags of sand stowed in the hold of the vessel were broken and leaking; that they were in that condition when they were placed aboard the sling; that sand continued to seep from the sling as it was hoisted

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[28] *Kermarec* v. *Companie General Transatlantique*, 1959, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550.

[29] *Marceau* v. *Great Lakes Transit Corporation*, 2 Cir. 1945, 146 F.2d 416.

[30] *Imperial Oil Limited* v. *Drlik*, 6 Cir., 1956, 234 F.2d 4.

from the hold and across the deck of the vessel and that the seepage continued over the apron of the pier to the place where Hagans was working and at the point where he was injured there was a sprinkling of sand on the floor. There was also ample evidence from which the jury could conclude that the injury which he suffered was caused when he slipped on the sand. We cannot give any effect to defendant's argument that this event happened as a result of the condition of the cargo after it had been discharged. The sand being on the pier had a direct casual relation to the improper stowage. In other words, due to improper stowage the ship was unseaworthy and due to the unseaworthiness, Hagans was injured and that created liability which cannot be avoided.

"Defendant next argues that all that it is required to do is furnish a reasonably safe place for plaintiff to work. As we have previously stated, Hagans was, as found by the jury, in the ship's service, the place where he was working was unsafe because of a condition caused by the ship itself, and, therefore, the ship is as liable as though Hagans had slipped on the deck itself.' Furthermore, there was convincing evidence in this case that the manner of discharging the cargo was improper. That in itself could create and did create an unsafe place to work. *Beard* v. *Ellerman Lines, Ltd.*, 3 Cir. 1961, 289 F.2d 201."[31]

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[31] *Hagans* v. *Ellerman & Bucknall SS Co.*, D.C.E.D. Penna., 1961, 196 F.Supp. 593.

POINT III. IN THE ABSENCE OF PREJUDICE TO THE RESPONDENT, THE MERE PASSAGE OF TIME WILL NOT BAR RELIEF UNDER THE GENERAL MARITIME LAW.

Mr. Justice Brennan in his concurring opinion in *McAllister* v. *Magnolia Petroleum Co.*, 1958, 357 U.S. 221, 78 S. Ct. 1201, 2 L. Ed. 2d 1272, stated:

> "Just as equity follows the law in applying, as a rough measure of limitations, the period which would bar a similar action at law, see Russell v. Todd, 309 U.S. 280, 287 (60 S. Ct. 527, 84 L. Ed. 754), I think that the maritime cause of action for unseaworthiness could be measured by the analogous action at law for negligence under the Jones Act, 46 U.S.C. § 688."[32]

If uniformity in the admiralty law is a desirable goal, the logic of the above quotation is compelling. The *McAllister* case was that of a seaman, whose Jones Act action had not prescribed but whose action for unseaworthiness had under the analogous Texas two-year statute. It has been held that the analogous statute in New York is the six year statute[33] and in Puerto Rico it is one year from the date the final decision of the administrator of the State Insurance Fund becomes executory.[34] Thus the yardstick by which laches is measured for the same occurrence will vary depending on whether the injured worker is a seaman or longshoreman, and if the worker be a longshoreman, it will vary from port to port, and even within the same port, depending upon the duration of medical treatment.

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[32] 357 U.S. 221 at page 229, 78 S. Ct. 1201 at 1206.

[33] *Le Gate* v. *The Panamolga*, 2 Cir. 1955, 221 F.2d 689; *Oroz* v. *American Presidents Lines*, 2 Cir., 1958, 259 F.2d 636.

[34] Laws of Puerto Rico Annotated, Title 11, Section 32; *Guerrido* v. *Alcoa Steamship Co.*, 1 Cir., 1956, 234 F.2d 349; *Waterman Steamship Corporation* v. *Rodriguez*, 1 Cir. 1961, 290 F.2d 175.

One's fundamental rights should not depend upon such fortuities.

From the date of occurrence until the date that petitioner filed his libel two years two months and nineteen days had elapsed. Reasonable excuse for the delay was asserted. The Court of Appeals holds that the excuse given, that a non-resident attorney had abandoned petitioner's claim, was no extenuation. It was never claimed to be.

Petitioner pleaded[35] and proved[36] that this delay did not prejudice the respondent. In the cases cited by the Court of Appeals the libellants had not successfully borne their burden of overcoming the presumption of prejudice.[37]

The trial court weighed the evidence and credibility of the witnesses and found that there had been no prejudice.[38] Without prejudice an action in admiralty cannot be barred by passage of time.[39]

This Court has delegated the responsibility of determining excusable delay and absence of prejudice to the trial court. In *Gardner* v. *Panama R. Co.*, 1951, 342 U.S. 29, 30-31, 72 S. Ct. 12, 13, 96 L. Ed. 31, it was held:

> "Although the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute

[35] Record, page 7.

[36] Record, pages 25-26, Record 103-115, Respondent's exhibits 9 and 10; Record 151-153.

[37] *Wilson* v. *Northwest Marine Iron Works*, 9 Cir., 1954, 212 F.2d 510; *Marshall* v. *International Mercantile Marine Co.*, 2 Cir. 1930, 39 F.2d 551; *McGrath* v. *Panama R.R.*, 5 Cir., 1924, 298 Fed. 303.

[38] Finding of Fact number 16, Record, page 19, Conclusion of Law, number 9, Record, page 21.

[39] *Gardner* v. *Panama R. Co.*, 1951, 342 U.S. 29, 72 S. Ct. 12, 96 L. Ed. 31; *Claussen* v. *Mene Grande Oil Company*, C.A., 3 Cir. 1960, 275 F.2d 108; *McDaniel* v. *Gulf & South American Steamship Co.*, 5 Cir., 1955, 228 F.2d 189.

> of limitations. The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief."

In *Wounick* v. *Pittsburgh Consolidation Coal Company*, 3 Cir., 1960, 283 F.2d 325, a case filed after the expiration of the Jones Act limitation, the Court of Appeals reversed a dismissal based on the mechanical application of the statute of limitations. After remand, the District Court, in finding no prejudice, pointed out that:

> "The respondent did have a list of possible witnesses of the accident from the day of its occurrence and afterwards. At this time all of the witnesses to the accident and the incident surrounding the accident were available to the respondent."[40]

So too, did the respondent in the case at bar have available all the possible witnesses. It chose not to interview them, even after their names were supplied in the deposition and answers to interrogatories. If by laches, one implies that a party sleeps on his rights, it was the respondent here that is guilty. There was no defense or fact relating to the accident or injuries that surprised the respondent. In fact it was the respondent itself that filed seventeen exhibits which included the names of the potential witnesses; evidence that the cargo was unseaworthy; evidence that defective cargo was discharged, that spillage occurred, and that the accident was reported and the nature of all the medical treatment.

It cannot be said that the Court of Appeals for the

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[40] *Wounick* v. *Pittsburgh Consolidation Coal Company*, D.C.W.D. Pa. 1962, 208 F. Supp. 67.

First Circuit is unfamiliar with this body of law. The decision below was rendered on April 11, 1962. On July 6, 1962, the same court delivered the opinion in *Cities Service Oil Co.* v. *Puerto Rico Lighterage Co.*, 1 Cir. 1962, 305 F.2d. 170. There, the Court held:

> "A suit in admiralty is barred by laches only where there has been *both* unreasonable delay in the filing of the libel and consequent prejudice to the party against whom the suit is brought . . . .
>
> "The delay in the commencement of the instant suit was inexcusable, but the inference of consequent prejudice to the respondent was overcome by the undisputed evidence."[41] (Emphasis supplied).

Likewise, the evidence rebutting the presumption of prejudice herein was undisputed.[42] The trouble was not that respondent was prejudiced by lack of evidence. It was prejudiced by the evidence. The evidence conclusively revealed the unseaworthy condition which proximately caused petitioner's injury. From the evidence the respondent could no more escape liability on the day of trial than it could had the case been tried the day after the occurrence. An observation of the United States Court of Appeals for the Fifth Circuit is pertinent:

> "What it (the respondent) knows is of no real help. But on this record there is no indication that if it

[41] 305 F.2d 170 at 171.

[42] In order to indicate prejudice, the Court of Appeals stated: "And while the records did in fact show spilling from the drafts, they showed none near the hatch opposite which libellant was working." This was manifest error. The witnesses testified as to the spillage and respondent's own exhibit number 12 shows broken bags in all hatches except number 5. Petitioner was working opposite number 2.

could learn more, it could extricate itself from the inexorable consequences of the American Maritime concept of seaworthiness."[43]

If there were no unseaworthy condition and no negligence as stated in the opinion below, why should laches be a "more specific difficulty?"[44] The Court of Appeals tacitly anticipated reversal of its holding as to negligence and unseaworthiness. Otherwise, the issue of laches was unnecessary to the decision.

POINT IV. THE FINDINGS OF THE DISTRICT COURT THAT THE VESSEL WAS UNSEAWORTHY, THE SHIPOWNER NEGLIGENT, AND THAT THERE WAS NO PREJUDICE TO THE RESPONDENT, WERE NOT CLEARLY ERRONEOUS.

The Findings of the District Court may not be set aside unless clearly erroneous.

McAllister v. *United States*, (1954) 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20.

In this particular case more than most, this doctrine warrants respect. The witnesses testified in Spanish, a language in which the trial judge is fluent. The opportunity to judge credibility and the importance of demeanor evidence is unique. Nevertheless, from an independent reading of the cold, translated record, the Court of Appeals made independent findings of fact, reversed findings of fact of the trial court which resolved conflicts in the evidence, and determined the weight to be given to exhibits as against testimonial evidence.

[43] *Vega* v. *The Malula*, 5 Cir. 1961, 291 F.2d 415.
[44] 301 F.2d 415, at page 417.

The Court below pointedly emphasizes that a bag of beans which the trial court found broke open in mid-air actually broke upon hitting the dock after a fall from mid-air. Then the Court of Appeals incurs in an error of fact by finding that no conduct in which respondent participated was responsible for the beans on the dock, completely ignoring a specific finding of the trial court and testimony by all of the fact witnesses to the effect that beans were spilling from drafts of broken bags throughout the unloading operations, and corroboration in respondent's Exhibit 10 showing broken bagged cargo.

As a basis for reversal, the Court of Appeals also relies on a prior statement of libelant, allegedly inconsistent with his testimony on trial. In so doing, the Court disregards the cross-examination to which petitioner was submitted (R. 37-38) in the presence of the trial court and which apparently clarified any inconsistency to the satisfaction of that court, and also disregards the uncontradicted and unimpeached testimony of all the other fact witnesses.

Continuing this apparent trial de novo, the appellate court finds that the memories of the witnesses had become impaired because they testified that rice and feed had also spilled from drafts, while respondent's records showed no rice or feed being discharged until after petitioner's accident. The witnesses stated the accident occurred in the afternoon. Respondent's Exhibit 2 indicated the accident occurred in the morning. Not only does the Court of Appeals vitiate the trial court's prerogative of determining the weight to be given to any particular evidence, and the comparative weight of testimonial as against documentary evidence, but it also substitutes the appellate court's conclusion for that of the trial court on a disputed issue.

On the laches issue, the Court of Appeals concluded that

the memories of the witnesses had become impaired.[45] The demeanor, the credibility and the weight to be given to the testimony was peculiarly for the trial Judge. The Court of Appeals did not conclude on this issue or any other, that there was no substantial evidence to support the conclusions of the lower court. The appellate court from its own reading of the record came to contrary conclusions. This, it has neither the right nor power to do.

> "A district court's findings of fact should be construed liberally and found to be in consonance with the judgment, so long as that judgment is supported by evidence in the record. Travelers Insurance Co. v. Dunn, 228 F2d 629 (C.A. 5, 1956). 'Whenever from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn . . . .' Triangle Conduit & Cable Co. v. Federal Trade Commission, 168 F.2d 175, 179 (C.A. 7), affirmed sub. nom.; Clayton Mark & Co. v. Federal Trade Commission, 336 U.S. 956, 69 S. Ct. 888, 93 L. Ed. 1110 (1949)."[46]

Once again, as in *Guzman* v. *Pichirilo*, (1962, 369 U.S. 698, 82 S. Ct. 1095, 8 L. Ed. 2d 205, the Court of Appeals has departed from the standards quoted above. Reinstatement of the findings of the District Court for the District of Puerto Rico would render it unnecessary to determine most of the issues of law brought before this Court by the grant of the writ. If for no other reason than to compel compliance with judicial standards repeatedly invoked by this Court, the finding of the trial court should

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[45] In addition to its erroneous reading of the exhibits discussed under Point III, supra.

[46] *Zimmerman* v. *Montour Railroad Company*, 3 Cir. 1961, 296 F.2d 97; also, *Blumenthal* v. *United States*, 3 Cir., 1962, 306 F.2d 16.

be reinstated. However, one issue, whether unseaworthiness extends to shore-based longshoremen should finally be resolved by this Court now.

It was thought that this issue had been laid to rest by the decision in *Strika* v. *Netherlands Ministry of Traffic*, 2 Cir. 1950, 185 F2d 555, and by the subsequent denial of certiorari in that case (1951), 341 U.S. 904, 71 S. Ct. 614, 95 L. Ed. 1343. By the opinion below, an irreconcilability of viewpoints as to the correct interpretation of the maritime law has arisen that can only be resolved by the Supreme Court.

There are many reasons why this Court should adopt the position taken in this matter by every federal court with the exception of the Court of Appeals for the First Circuit. One reason stands out above all others—there is no legal or logical distinction between classes of longshoreman performing the traditional duties of seamen. The petitioner herein was performing duties as vital to the discharge of cargo as those of the other longshoremen aboard. One could not discharge cargo without him to disengage it from the winch hook any more than one could discharge cargo without men aboard to load the drafts. If humanitarian justice underlies the doctrine of seaworthiness, it requires the inclusion of the petitioner within that doctrine and a reversal of the decision on appeal.

Conclusion

The findings of the trial court, and the decree in favor of the petitioner against the respondent based on these findings should be reinstated. The decision of the United States Court of Appeals for the First Circuit wherein it held that the seaworthiness doctrine did not apply to shore-based longshoremen should be reversed.

Respectfully submitted,

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